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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

JOSEPH M. DONLON, and CATHERINE DONLON, *Petitioners,*

v.

INTERNAL REVENUE SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONVERSE MURDOCH
Counsel for Petitioners
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P. O. Box 949
Wilmington, Delaware 19899

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In The

Supreme Court of the United States

October Term, 1972

No. _____

Joseph M. Donlon, and Catherine Donlon, *Petitioners,*

v.

Internal Revenue Service, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph M. Donlon and Catherine Donlon pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 30, 1973.

OPINIONS BELOW

The memorandum opinion of the District Court, printed in Appendix B, *infra,* p. 19, is reported in 345 F. Supp. 591 (D.C. Del., 1972); 72-1 USTC ¶ 9406. The opinion of the Court of Appeals for the Third Circuit, printed in Appendix B, *infra,* p. 26, is not yet officially reported but is unofficially reported in 73-1 USTC ¶ 9476.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 30, 1973. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Does the data compiled by the Internal Revenue Service in connection with an audit of the petitioners' income tax liability constitute an "investigatory file compiled for law enforcement purposes" within the meaning of 5 U.S.C. § 552(b)(7), so as to permit the Internal Revenue Service to refuse to disclose that data to the petitioners in a proceeding under the Freedom of Information Act?

Does the exception clause found in § 552(b)(7), which provides for disclosure " to the extent available by law to a party other than an agency", include availability under the discovery provisions of the Federal Rules of Civil Procedure, so that the petitioners may nevertheless obtain investigatory files upon a showing that those files are obtainable under the Federal Rules of Civil Procedure, factors of relevancy and materiality aside?

If the exception clause found in § 552(b)(7) does allow disclosure of otherwise exempt investigatory files to the extent discoverable under the Federal Rules of Civil Procedure, may the petitioners nevertheless be denied disclosure merely because they are simultaneously litigants before the United States Tax Court?

STATUTE INVOLVED

The statutory provision involved is the *Freedom of Information Act*, 81 Stat. 54, codifying 80 Stat. 250; 5 U.S.C. § 552. It is printed in Appendix A, *infra*, p. 11.

STATEMENT OF CASE

This petition arises out of an action brought by the petitioners before the United States District Court for the Dis-

trict of Delaware under the Freedom of Information Act to enjoin the Internal Revenue Service from withholding agency records and to order production of those records. Jurisdiction was conferred on the United States District Court by 5 U.S.C. § 552(a)(3).

The Commissioner of Internal Revenue issued a statutory notice of deficiency to the petitioners, asserting that the petitioners' incomes for 1957 through 1960 had been determined using the "net worth method" and that, as a result of that determination, it had also been determined that there was a deficiency in federal income tax due for each of those years, as well as a penalty for fraud under § 6653(b) of the Internal Revenue Code, 26 U.S.C. § 6653(b). The petitioners filed a petition with the then Tax Court of the United States, Docket No. 881-65, requesting a redetermination of the deficiencies and penalties.

Concurrently with the civil tax proceeding, the Internal Revenue Service also conducted an investigation of the petitioner, Joseph M. Donlon, to ascertain whether any criminal violations under the Internal Revenue Code had been committed with respect to the same years. The criminal investigation was terminated shortly before October 12, 1970, with a recommendation that no criminal prosecution be sought.

On Ocober 12, 1970, the petitioners requested copies of certain records of the Internal Revenue Service pursuant to the Freedom of Information Act, in conformity with the published rules of the Internal Revenue Service for such requests. 26 CFR § 601.702(c). The requested records consisted of the schedules, work papers, and background data prepared by or utilized by the internal revenue agent in determining the petitioners' taxable incomes by the net worth method.

Counsel for the Service, in the proceeding before the Third Circuit, indicated that the requested records "might" have been used for a criminal prosecution, since they were

compiled with "a possible (though often remote) view" toward both purposes.

The request was denied on the grounds that the records were exempt from disclosure under Subsections 3(e)(5) and (e)(7) of the Act, exempting from disclosure, respectively, "(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency" and "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The denials are printed in Appendix B, *infra*, p. 15.

On February 12, 1971, the petitioners brought suit under the Freedom of Information Act, praying for relief from the denial of their request by the Internal Revenue Service. The Internal Revenue Service filed a motion to dismiss and, subsequently, a motion for summary judgment.

On March 7, 1972, the District Court filed its Memorandum Opinion, holding that the Freedom of Information Act exemption for investigatory files exempted files relating to the enforcement of all kinds of federal laws, civil or criminal. The District Court also held that the exception for records available by law to a party was a mere savings clause and did not cause otherwise exempt investigatory files to be available upon a showing of availability under the Federal Rules of Civil Procedure, factors of materiality and relevancy aside. Moreover, held the Court, the petitioners were not parties to a proceeding before a District Court, but rather litigants before the Tax Court. In such a case, the District Court was not required to exercise the equitable jurisdiction, which it held itself to have, to apply Tax Court rules of procedure. The District Court entered summary judgment against the petitioners on April 3, 1972.

An apeal was taken to the United States Court of Appeals, which, by a *per curiam* opinion of the Court filed May 30, 1973, affirmed the judgment of the District Court.

ARGUMENT FOR ALLOWING THE WRIT

The petitioners pray that a writ of certiorari may issue for the reasons that (1) the decision of the Third Circuit that "investigatory files compiled for law enforcement purposes" includes files compiled for all enforcement proceedings, civil or criminal, is in direct conflict with decisions of the District of Columbia Circuit and probably also the Sixth Circuit; (2) the decision of the Third Circuit that the phrase "except to the extent available by law to a party" is a mere savings clause is probably in conflict with a decision by this Court and decisions by the Second and Ninth Circuits; and (3) the decision of the Third Circuit, to the extent it represents an exercise of equitable power in the Court, is in direct conflict with decisions of the District of Columbia Circuit and probably also the Sixth Circuit.

Investigatory Files

Section 552(b)(7) exempts from disclosure "investigatory files compiled for law enforcement purposes". The Third Circuit held that these words include, and exempt, investigatory files relating to the enforcement of all kinds of federal laws, civil as well as criminal.

The District of Columbia Circuit Court of Appeals was the first Circuit Court to examine the exemption for investigatory files. In *Bristol-Myers Co.* v. *F.T.C.*, 424 F.2d 935 (Dist. of Col. Cir., 1970), cert. den. 400 U.S. 824, 91 S.Ct. 46, 27L.Ed.2d 52 (1970), that Court reversed and remanded the dismissal of an action brought under the Freedom of Information Act to obtain reports and materials pertaining to a proposed rule-making by the F.T.C. on certain drugs manufactured by Bristol-Myers.

> "If further adjudicatory proceedings are imminent, then the company's request may fall within the category the exemption was designed to control. *Congress intended to limit persons charged with violation of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal*

> *law*.... [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable." 424 F.2d 935, 939. (Emphasis added.)

The District of Columbia Circuit Court of Appeals would not have equated the Act's exemption to the discovery available to persons charged with violations of federal criminal laws unless it similarly limited the scope of investigatory files to files compiled for criminal law enforcement. Moreover, the Court held that, to be exempt, the criminal actions for which the files were compiled must be "imminent" and "concrete".

Equally applicable is the decision of the Sixth Circuit Court of Appeals in *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787 (6th Cir., 1972), where the Internal Revenue Service sought to avoid disclosure of its Manual relating to the examination of returns and interrogation of taxpayers. Section 552(a)(2)(c) of the Freedom of Information Act requires disclosure of "administrative" staff manuals. The Service argued that "administrative" matters are to be distinguished from "law enforcement" matters, the latter not to be disclosed. Since the issue was nondisclosure of "law enforcement" matters, the holding the Court is equally applicable to the exemption under § 522 (b)(7).

> "It was obviously not the purpose of the Information Act to exclude from compulsory disclosure all material which might eventually affect the law enforcement process. Rather, it would seem logical to assume that the intent of the limit on (a)(2)(c) was to bar disclosure of information which, if known to the public, would *significantly impede* the enforcement process."
>
> "Law enforcement is the process by which a society

> secures compliance with its duly adopted rules. Enforcement is adversely affected *only* when information is made available which allows persons simultaneously to violate the law and to avoid detection. * * * "
>
> * * *
>
> "The exception for law enforcement materials contained in (a)(2)(c) is, as suggested above, a very narrow one and is to be applied only where the sole effect of disclosure would be to enable law violators to escape detection. Thus, for example, there is reason to exempt from compulsory revelation details of a selective enforcement policy made necessary by a lack of sufficient investigatory personnel. Similarly interrogation techniques or the mechanics of an F.B.I. 'stakeout' arrangement properly could be excluded from disclosure under (a)(2)(c). * * * 467 F.2d 787, 795.

The Sixth and District of Columbia Circuit Courts of Appeals decisions accordingly hold that law enforcement matters, protected from disclosure under the Act, consist solely of the mechanics by which persons violating criminal statutes are apprehended, plus the files compiled for the imminent prosecution of these persons. The decision of the Third Circuit Court of Appeals in the present case is directly in conflict, in that the Third Circuit does not so limit nondisclosure, but rather extends it to the enforcement of all kinds of laws, civil or criminal.

Availability at Law

The Third Circuit held that the exception in Section 552(b)(7), providing for disclosure of investigatory files "to the extent available by law to a party other than an agency" did not include availability under the discovery provisions of the Federal Rules of Civil Procedure.

This Court, in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973) had before it the issue of the meaning of identical wording in the exemption of Section 552(b)(5), exempting inter-agency memorandums or letters. This Court said:

> "This language clearly contemplates that the public is entitled to all such memoranda or letters that a pri-

> vate party could discovery in litigation with the agency. • • • [A]t best the discovery rules can only be applied under Exemption 5 by way of rough analogies. • • • Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." 410 U.S. 73. —.

The majority opinion did not specify the exact rules of discovery to be applied, although it expressly assumed that Congress had legislated against the backdrop of existing case law and that the general rule was that factual material was available to private parties in litigation with the Government. 410 U.S. 73, —. Mr. Justice Douglas, dissenting on another issue, said:

> "[The trial judge's] second task would be to determine whether under normal discovery procedures contained in Rule 26 of the Rules of Civil Procedure, [parts of the requested documents] would thereof be available to litigants confronting the agency in ordinary lawsuits." 410 U.S. 73, —.

The Second and Ninth Circuit Courts of Appeals, in, respectively, *Consumers Union of U.S.* v. *Veterans Administration*, 301 F. Supp. 796, 804 (D.C., N.Y., 1969), appeal dismissed 436 F.2d 1363 (2nd Cir., 1970) and *Benson* v. *General Services Administration*, 415 F.2d 878, 880 (9th Cir., 1969) hold that the test is met if the requested records would be "available to any party in any litigation in which the agency having the records might be involved."

Although the petitioners argued that the Internal Revenue Service might be, and often is, involved in litigation to which the Federal Rules of Civil Procedure are applicable, and that information of the type requested was discoverable in such litigation, the Third Circuit Court of Appeals held that the petitioners were not before the District Court and had no rights under the Federal Rules, and that the quoted wording was a mere savings clause. That holding is directly contrary to this Court's holding that the Act does not permit inquiry into the needs of the individual making

the request, and is probably in direct conflict with the holdings of the Second and Ninth Circuits that the point of examination is any forum in which the agency may be involved, rather than the specific forum in which the individual is involved, if any.

Equitable Discretion

The Third Circuit held that, if the discovery rules of the Tax Court permitted discovery of the requested records, the petitioners should exercise their rights to discovery in the Tax Court and that the District Court was not required to exercise its equitable powers to order the production of the records.

It is difficult to distinguish the point of impact of the petitioners' status as litigants in a proceeding before the United States Tax Court in the present petition for a writ of certiorari. In one instance, it can be questioned whether, under the Freedom of Information Act, the needs and status of the petitioners is ever an issue for consideration. In another, it can be questioned whether the applicable discovery rules are those of any court in which the agency may be found or those of the specific court, if any, in which the petitioners are to be found. Finally, if equitable jurisdiction of the District Court is in fact involved, it can be questioned whether those equitable powers are to be exercised if the Tax Court Rules of Procedure provide an adequate remedy at law.

The petitioners submit their petition for a writ of certiorari on the question raised by the second instance, to wit, that it was error to disregard the Federal Rules of Civil Procedure as the source of applicable discovery rules. The petitioners believe that their status as litigants in the Tax Court is irrelevant under the Act and that the Act itself forecloses the exercise of equitable powers by the District Court.

However, as a basis for requesting the writ, the petitioners assert that there is a direct conflict between the

decision of the Third Circuit and the District of Columbia Circuit over the extent to which a District Court has equitable powers under the Freedom of Information Act.

In *Soucie* v. *David*, 448 F.2d 1067, 1077 (Dist. of Col. Cir., 1971) and in *Getman* v. *N.L.R.B.*, 450 F.2d 670, 678 (Dist. of Col. Cir., 1971), the District of Columbia Circuit Court of Appeals held that, by directing disclosure to any person, the Act precludes a consideration of the interest of the specific party seeking relief. Through the general disclosure requirement and the specific exemptions, the Act has, in itself, balanced the equities of the right to know against the need for secrecy. Having done so itself in the Act, Congress intended to confer no power upon the courts to consider the equities of disclosure or nondisclosure.

CONCLUSION

Congress sought to balance the right of the public to know and the need of the government to operate efficiently, both requisite but often competing principles of the democratic process, in the Freedom of Information Act. It was intended that the Act's general rule of availability and its enumerated exceptions would replace the unworkable concepts of "properly and directly concerned" and "for good cause found". It is respectfully submitted that the decision of the Third Circuit, in conflict with the Sixth and District of Columbia Circuits, with its inquiry into the petitioners' status and its exercise of equitable powers, creates a confusion corrosive of the Act's general rule of availability and represents a return to the often abused tests of proper concern and good cause. To resolve these conflicts, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CONVERSE MURDOCH
Wilmington, Delaware
Counsel for Petitioners

August, 1973

APPENDIX

APPENDIX

APPENDIX A

Statute Involved

Freedom of Information Act:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a

matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, §1, June 5 1967, 81 Stat. 54.

APPENDIX B

Opinions and Judgment Below

US Treasury Department
Internal Revenue Service

Date: Nov. 8, 1970
In reply refer to: CP:C:D

Converse Murdoch, Esquire
330 Delaware Trust Building
Wilmington, Delaware 19801

Dear Mr. Murdoch:

This letter is in reply to your letter of October 12, 1970, addressed to Commissioner of Internal Revenue, Washington, D.C. 20224; Regional Commissioner, Internal Revenue Service, 2 Penn Central Plaza, Philadelphia, Pennsylvania 19102; and District Director, Internal Revenue Service, Wilmington, Delaware 19802, concerning the Tax Court case of Joseph and Catherine Donlon, Tax Court Docket No. 881-65, wherein you requested that certain documents be furnished to you pursuant to the provisions of the Freedom of Information Act, P.L. 89-487, 80 Stat. 250 (1966), 5 U.S.C. 552. Specifically, your letter requested the following:

1. All interdepartmental and inter-agency communications between the Commissioner of Internal Revenue, the Regional Commissioner of Internal Revenue for the Mid-Atlantic Region, and the District Director of Internal Revenue, Wilmington, Delaware, their respective agents, servants, employees or representatives, from whatever origin in whichever of these offices to whatever destination in whichever of these offices, in any respect concerning the petitioners herein the the taxable years herein, with respect to (a) their alleged failure to report income and their alleged intent in such alleged failure

to report; and (b) the determination of the existence and amount of the alleged unreported income.

2. All reports, communications, statements, analyses, memoranda, schedules and other writings by whosoever prepared upon which the Commissioner of Internal Revenue relied in making his determination that the petitioners failed to report income in the taxable years herein involved and that such failure was accompanied by a fraudulent intent to evade tax.

3. All intra-agency communications between the Commissioner of Internal Revenue, the Regional Commissioner of Internal Revenue for the Mid-Atlantic Region, or the District Director of Internal Revenue, Wilmington, Delaware, their respective agents, servants, employees or representatives, and any other governmental agency, commission or department, its agents, servants, employees or representatives, whether federal, state or local and whether administrative, judicial or legislative, from whatever origin to whatever destination, concerning the petitioners herein, their respective occupations, activities, sources and amounts of income, and amounts of income reported as subject to federal income taxes, together with petitioner's concurrent intentions, in any of the taxable years herein involved, other than pleadings filed with the United States Tax Court to the above-captioned names and docket number of which copies have been served on the petitioners.

4. All intra-agency communications between the parties set forth in request 3 above concerning any governmental action, federal, state or local, whether civil or criminal, brought against the petitioner Joseph M. Donlon, herein, whether before, during, or after the taxable years in question herein, from which an inference could be drawn as to the occupation, activity and sources and amounts of income received of and by the petitioner Joseph M. Donlon during the taxable years in question herein, other

than pleadings filed with the United States Tax Court to the above-captioned names and docket number of which copies have been served on the petitioners.

We have determined that the memoranda, etc., referred to above are not open to your inspection, it being the position of the Internal Revenue Service that under the provisions of 5 U.S.C. 552(b)(5) and 552(b)(7) such memoranda, etc. are exempt from disclosure.

In addition to the statutory notice of deficiency and the pleadings which you except from your request, you no doubt have the revenue agent's report furnished to your client about August 14, 1964. If you do not have the revenue agent's report, it is suggested that you specifically request a copy.

The memoranda, etc. requested are located in the Office of Regional Counsel, 2 Penn Center Plaza, Philadelphia, Pennsylvania 19102. At anytime within 30 days after the date of this letter you may file an appeal of our determination to the Commissioner of Internal Revenue. The appeal must be in the form of a statement signed by the appellant and mailed to the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. The statement must contain: (1) The appellant's name and address; (2) the identification of the records requested; (3) the date of the request and the date of the letter denying the request; and (4) a request that the Commissioner consider the denial.

Very truly yours,

D. W. Bacon

Assistant Commissioner
(Compliance)

Department of the Treasury
Internal Revenue Service
Washington, D.C. 20224

Date: Jan. 8, 1971
In reply refer to: C:DC

Converse Murdoch, Esquire
330 Delaware Trust Building
Wilmington, Delaware 19801

Dear Mr. Murdoch:

In re: Joseph M. and Catherine Donlon, Petitioners
United States Tax Court Docket No. 881-65

This is in reply to your letter of December 2, 1970, transmitting an Appeal From Denial of Request for Records, dated November 25, 1970, appealing the determination of Assistant Commissioner Bacon denying your request for records set forth in a request of October 12, 1970.

I have given thorough consideration to Mr. Bacon's determination in this matter and have concluded that the matters requested by you are exempt from disclosure under the provisions of the Freedom of Information Act, specifically, 5 U.S.C. 552(b)(5) and 552(b)(7).

With kind regards,

Sincerely,

RANDOLPH THROWER

Commissioner

IN THE

United States District Court for the District of Delaware

JOHN J. WILLIAMS and
ELIZABETH M. WILLIAMS, his wife,
Plaintiffs,

v.

INTERNAL REVENUE SERVICE,
Defendant.

Civ. A. No. 4063

JOSEPH M. DONLON and
CATHERINE DONLON, his wife,
Plaintiffs,

v.

INTERNAL REVENUE SERVICE,
Defendant.

Civ. A. No. 4064

Converse Murdoch, Esquire, and Robert E. Schlusser, Esquire, of Murdoch & Walsh, Wilmington, Delaware, for Plaintiffs

F. L. Peter Stone, United States Attorney, Wilmington, Delaware, Charles Stratton, Esquire, United States Department of Justice, Washington, D.C., Attorneys for Defendant

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MEMORANDUM OPINION

Wilmington, Delaware
March 7, 1972

STAPLETON, J.

This is an action brought pursuant to the agency records provisions of The Freedom of Information Act, 5 U.S.C. § 552(a)(3), to enjoin the Internal Revenue Service from withholding records from the plaintiffs and to order their production. Jurisdiction is invoked under 5 U.S.C. § 552 (a)(3).

The complaint alleges that on February 23, 1965, plaintiffs filed a petition with the Tax Court of the United States seeking a redetermination of certain deficiencies proposed by the Commissioner of Internal Revenue with respect to plaintiffs' federal income taxes for the calendar years 1957 through 1960 inclusive. It further alleges that plaintiffs, on October 12, 1970, requested copies of certain records of the Internal Revenue Service, identified in the request, pursuant to the provisions of The Freedom of Information Act and in conformity with the published rules of the Internal Revenue Service. The request was denied on the grounds that the records were exempt from disclosure under the provisions of subsections 3(e)(5) and (e)(7) of the Act, 5 U.S.C. § 552(b)(5) and (7).

Defendant has filed a motion to dismiss and a subsequent motion for summary judgment. In support of the latter motion, defendant has filed an affidavit of an internal revenue agent who was personally familiar with and had reviewed the contents of the IRS files requested by plaintiffs herein ("the Smallwood affidavit"). The affidavit states that the files contain the schedules, work papers and background data prepared or utilized by him in his effort "to determine taxable income by the net worth method." Specifically, the agent states:

> "9. The net worth schedules provide the basis of the deficiency determinations and were prepared by me from the records submitted by the plaintiffs supplemented by numerous schedules, computations and independent investigations by me or at my request. The workpapers, computations, internal memorandums,

> recommendations and opinions in connection with the investigation and determination of the tax liabilities of the plaintiffs for the years 1957 through 1960 constitute the records requested by the plaintiffs in these Freedom of Information Act suits. The files also contain copies of arrest and conviction records of the male plaintiffs."

The affidavit concludes with the following conclusory allegations:

> "12. The records sought by the plaintiffs are investigatory files and intra-agency memorandums as herein referred to, particularly in paragraph 9. Information contained in the files relating to the plaintiffs, not already in their possession, is investigatory in nature and was compiled for the purpose of enforcement of the Internal Revenue Laws, or is intra-agency memorandums."

In response to this affidavit, plaintiffs filed affidavits of their own pursuant to Rule 56(f), Fed. R. Civ. P., stating that each of them "lacks information to enable him to determine whether or not the records requested are of the nature asserted by the defendant," and that "knowledge of the facts essential to justify his opposition to the defedant's motion for summary judgment is exclusively with and under the control of the defendant."

Defendant presses several grounds upon which it believes it is entitled to have the complaint dismissed or summary judgment entered in its favor. Under the view I take of the matter, the appropriate starting point is the defendant's claim to an exemption from disclosure under subsection 3(e)(7) of The Freedom of Information Act, which, as codified, provides:

> "(b) This section does not apply to matters that are—
>
> . . .
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"
>
> 5 U.S.C. § 522(b)(7)

Based upon the legislative history and the case law, I conclude that the phrase "investigatory files compiled for law enforcement purposes" includes and, therefore, exempts investigatory files relating to the enforcement of all kinds of federal laws, civil as well as criminal. H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966);* *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971); *Bristol Myers Company* v. *F.T.C.*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824; *Benson* v. *United States*, 309 F. Supp. 1144 (D. Neb. 1970); *Clement Brothers Co.* v. *N.L.R.B.*, 282 F. Supp. 540 (N.D. Ga. 1968), *aff'd.*, 407 F.2d 1027 (5th Cir. 1969); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D. P.R. 1967).

Plaintiffs do not contend that the records described in the Smallwood affidavit are beyond the scope of this phrase "as so construed." Rather, they point to the fact that the investigatory files exemption does not protect files compiled for law enforcement purposes "to the extent available by law to a party other than an agency." They argue that "available by law" includes availability under the Federal Rules of Civil Procedure. In order to make this proposition of law material to the disposition of this case, however, plaintiffs must go on to say that any person is entitled to all he could obtain under the Federal Rules of Civil Procedure even though he is not at the time of the demand engaged in litigation to which those rules are applicable. See Rule 1, Fed. R. Civ. P.

If this is the meaning of The Freedom of Information Act, it automatically follows that anyone under law enforcement investigation by the government has right to material contained in the files of the government prior to the institution of court action if he can meet the discovery

* While S. Rep. No. 813, 89th Cong., 1st Sess. (1965), which also deals with the Act, can arguably support a more restrictive construction of this exemption, such a construction is not compelled by the language of that report and both the House and Senate reports can be reconciled by accepting the former's interpretation on this point. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 799 (1967).

requirements of the Federal Rules. Since plaintiffs maintain that the Act does away with any requirement of showing relevancy or materiality in connection with any particular problem, this would mean that any such person under investigation would be entitled to the files without any showing unless work-product or other privilege is asserted, and in the case of work-product, upon a showing of unavailability, etc. pursuant to Rule 26(3)(b).

Such a result clearly was not anticipated or intended by Congress when it adopted The Freedom of Information Act. The section of the House Report referred to above states:

> "7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. *S.1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.*" (Emphasis supplied) H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966).

The Senate Report similarly indicates that the exemption was incorporated in the Act because of a concern that disclosure of investigaory files, except to the extent they were already available, "could harm the government's case in court." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). See also *Long* v. *I.R.S.*, Civil Action No. 9782 (D.D.C. 1971); *Benson* v. *United States*, 309 F. Supp. 1144 (D. Neb. 1970).

Subsection 3(e)(7) exempts investigatory files compiled for law enforcement purposes. The "exception" clause of the investigatory files exemption is, as I view it, merely in effect a savings clause. Congress did not intend to overrule by implication any existing law which would provide a particular individual in particular circumstances with a right to access. E.g., The Jencks Act, 18 U.S.C. § 3500, giving criminal defendants the right of access to the prior state-

ments of persons who have testified against them even though those statements may have been acquired by the government in the course of investigation.

This construction is entirely consistent with the general proposition that The Freedom of Information Act is a public disclosure statute giving "any person" a general right of access to government records without reference to his particular circumstances, his motive or his need. But the rights of specific persons under government investigation and seeking the files dealing with them were for good reasons not meant to be affected by this general public disclosure statute. The law with respect to access to them is to be determined by the law as it exists without reference to The Freedom of Information Act.

The discovery provisions of the Federal Rules of Civil Procedure give disclosure rights, with certain exceptions not here relevant, only to parties to litigation pending in the United States District Court. Rule 1, Fed. R. Civ. P. At the time of the demand here, plaintiffs were not in this position and had no rights under the Federal Rules. Rather, they were parties to a proceeding before the Tax Court.

The parties here disagree on the extent to which the rules of the Tax Court authorized discovery of the material which the plaintiffs seek. To the extent those rules do authorize access, it can be said, in one sense, that the contents of the IRS files are not within the scope of the subsection 3(e)(7) exemption. This does not mean, however, that this Court should necessarily allow the petitioner to seek in this proceeding any material which is not exempt solely because of the operation of the rules of the Tax Court. Under The Freedom of Information Act, the federal district courts are granted equity jurisdiction to order the production of agency records in appropriate cases. This court is not, in my judgment, required to exercise that jurisdiction in a manner which would involve applying the Tax Court rules of procedure in a collateral proceeding. See *Davis, The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761,

767 (1967). If the plaintiffs are entitled to the access they seek under the Tax Court rules, they should proceed to enforce their rights in that court.

If I correctly understand the positions of the parties, the conclusions reached above should dispose of this matter. Specifically, it is my understanding that the plaintiffs resisted the motion for summary judgment and filed their Rule 56(f) affidavits not because they wished to litigate further the question of whether, in fact, the materials described in the Smallwood affidavit are "investigatory files compiled for law enforcement purposes" as that phrase has now been construed, but rather because they believed they should not suffer summary judgment without an opportunity to present sufficient information to allow them to demonstrate to the court that they were entitled to access of the scope permitted under the Federal Rules of Civil Procedure. If this understanding is in error and plaintiffs request it within ten days of the date of this opinion, the court will inspect the file *in camera* solely for the purpose of determining whether the documents contained therein were, in fact, compiled for law enforcement purposes. *Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal. 1971). If no such request is made, the defendant may submit a form of order granting summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1600 and 72-1601

JOHN J. WILLIAMS and
ELIZABETH M. WILLIAMS, his wife,
Appellants in No. 72-1600

v.

INTERNAL REVENUE SERVICE

(D. C. Civil Action No. 4063)

JOSEPH M. DONLON and
CATHERINE DONLON, his wife
Appellants in No. 72-1601

v.

INTERNAL REVENUE SERVICE

(D. C. Civil Action No. 4064)

APPEALS FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued on April 30, 1973

Before HUNTER and WEIS, *Circuit Judges* and NEWCOMER, *District Judge*

OPINION OF THE COURT
(Filed May 30, 1973)

PER CURIAM:

Appellants seek to overturn the granting of summary judgments by the District Court in favor of the Internal

Revenue Service denying appellants' requests for injunctive relief pursuant to the Freedom of Information Act, 5 U.S.C., § 552. Spcifically, appellants sought to enjoin the Internal Revenue Service from withholding certain identified records related to the determination of appellants' tax deficiencies presently under question in the United States Tax Court.

The District Court granted summary judgment on the grounds that (1) the data compiled in connection with an audit of an individual's income tax liability constitutes an "investigatory file compiled for law enforcement purposes" wthin the meaning of 5 U.S.C., § 552(b)(7); (2) the exception clause found in § 552(b)(7) which provides for disclosure "to the extent available by law to a party other than an agency" does not include availability under the discovery provisions of the Federal Rules of Civil Procedure; and (3) even if the exception clause found in § 552(b)(7) was construed to allow discovery under the Federal Rules of Civil Procedure, those provisions would not apply in this case because the parties are presently involved in litigation before the United States Tax Court and not the United States District Court.

After carefully considering the briefs, oral argument and the District Court Opinion, we conclude that the District Court correctly granted summary judgment in favor of the appellee, the Internal Revenue Service, and we agree with the reasoning of the learned District Court Judge which is set forth in his Memorandum Opinion filed March 7, 1972.

Accordingly, the judgment of the District Court will be affirmed.

SUPREME COURT, U. S.
No. 73-343
FILED
OCT 17 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH M. DONLON AND CATHERINE DONLON,
PETITIONERS

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 19-25) is reported at 345 F. Supp. 591. The opinion of the court of appeals (Pet. App. 26-27) is reported at 479 F. 2d 317.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26) was entered on May 30, 1973. The petition for a writ of certiorari was filed on August 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service records sought by petitioners under the Freedom of Information Act are investigatory files compiled for law enforcement purposes, and therefore exempt from disclosure.

STATUTE INVOLVED

The Freedom of Information Act is set forth at Pet. App. 11-14.

STATEMENT

In February 1965, petitioners filed a petition in the United States Tax Court for a redetermination of income tax deficiencies and civil fraud penalties assessed by the Commissioner.[1] In October 1970, petitioners requested, in a letter to the Internal Revenue Service, all reports, communications, memoranda and other writings upon which the Commissioner relied in determining the deficiencies against petitioners. In addition, petitioners sought all interdepartmental, inter-agency and intra-agency communications which concerned their tax liabilities (Pet. App. 15-16, 20). The request was denied on the grounds that the records sought were exempt from disclosure under subsections (b)(5) and (7) of the Freedom of Information Act, 5 U.S.C. 552.

Petitioners then instituted the present case in the district court to compel disclosure of the requested information. The district court granted summary judgment for the government, holding that the records sought by petitioners were investigatory files compiled for law enforcement purposes and therefore exempt under subsection (b)(7) of the Act (Pet. App. 22-25). The court of appeals affirmed *per curiam* (Pet. App. 26-27).

ARGUMENT

1. Under subsection (b)(7) of the Freedom of Information Act, investigatory files compiled for law enforcement purposes are exempt from disclosure except to the

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[1] Petitioners' suit is still pending in the Tax Court.

extent available by law to a party other than an agency. The courts below held that this exemption applies to investigatory files compiled for civil as well as criminal law enforcement, rejecting petitioners' contention that the exemption covers only investigatory files relating to the enforcement of criminal laws. This holding is correct and is in accord with the legislative history of the Act and with other decisions. See H. Rep. No. 1497, 89th Cong., 2d Sess., p. 11; *Soucie* v. *David*, 448 F. 2d 1067, 1078, n. 45 (C.A.D.C.); *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726, 727 (N.D. Calif.).

Petitioners assert (Pet. 5-7) that the decision of the court of appeals below on this point is in conflict with the decision of the District of Columbia Circuit in *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, certiorari denied, 400 U.S. 824. There is no conflict. The court in *Bristol-Myers* did not decide that the exemption for investigatory files is limited to criminal investigations; to the contrary, it distinguished between investigations anticipating enforcement proceedings, civil or criminal, and more general investigations made in connection with rule making proceedings, and held only that the latter were subject to disclosure. Moreover, in *Soucie* v. *David*, *supra*, the District of Columbia Circuit explicitly stated that the subsection (b)(7) exemption covers files prepared for civil enforcement purposes.[2]

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[2] Petitioners' reliance (Pet. 6-7) on *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (C.A. 6), is also misplaced. That case did not involve the subsection (b)(7) exemption for investigatory files at issue here. The question there was whether the portions of the Internal Revenue Service Manual sought by the taxpayer

The Internal Revenue Service files sought by petitioners here relate to a specific investigation of their tax liability; that investigation was undertaken for the joint purpose of civil and criminal enforcement of the tax laws (see Pet. 3) and therefore this case does not even raise the clear question of whether purely civil enforcement files are subject to disclosure. The files here would be covered by subsection (b)(7) of the Act even if purely civil enforcement files were not. Cf. *Donaldson* v. *United States*, 400 U.S. 517.

2. Petitioners also contend (Pet. 7-9) that the court below erred in refusing to look to the discovery provisions of the Federal Rules of Civil Procedure in considering whether the investigatory files sought by petitioners were "available by law" to them for purposes of subsection (b)(7). But the legislative history pertaining to this exemption makes it clear that Congress did not intend the Act to be used by a party involved in litigation with an agency in order to obtain greater or earlier access to investigatory files than such party would be able to obtain through discovery in the litigation. H. Rep. No. 1497, *supra*, p. 11; see *Bristol-Myers Co.* v. *Federal Trade Commission*, *supra*, 424 F. 2d at 939. The investigatory files sought by petitioners related to proceedings pending in the Tax Court to which the discovery procedures of the Federal Rules of Civil Procedure are inapplicable. There was therefore no basis for referring to those Rules in this case.

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were administrative in nature and therefore subject to disclosure under subsection (a)(2)(C) of the Act, which provides that "administrative staff manuals and instructions to staff that affect a member of the public" shall be made available for public inspection and copying.

Moreover, even assuming *arguendo* that the Federal Rules of Civil Procedure were applicable, petitioners would still not have been entitled to disclosure of the files. These files, consisting in part of work papers, computations and internal memoranda, communications and opinions, all relating to petitioners' case, represent attorneys' work product and therefore would have been exempt from discovery under the Rules. See *Hickman* v. *Taylor*, 329 U.S. 495.[3]

3. The court of appeals was also correct in refusing to make a collateral determination whether petitioners would be able to discover the investigatory files at issue in the Tax Court. There was no reason for the court to decide that question, since petitioners may obtain a direct ruling from the Tax Court. Contrary to petitioners' contention (Pet. 9-10), the court's ruling does not conflict with the decisions of the District of Columbia Circuit in *Soucie* v. *David*, *supra*, and *Getman* v. *National Labor Relations Board*, 450 F. 2d 670. Those cases hold merely that a court does not have equitable discretion to refuse disclosure of information that does not fall within any of the specific exemptions of the Act. In the instant case, however, the court simply refused to determine whether information exempt

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[3] Contrary to petitioners' assertion (Pet. 7-8), this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, provides no basis for review of the decision of the court below. That case did not involve exemption (b)(7) but the different considerations pertaining to the subsection (b)(5) exemption for inter-agency or intra-agency memoranda or letters. *Consumers Union of U.S., Inc.* v. *Veterans Administration*, 301 F. Supp. 796 (S.D. N.Y.), appeal dismissed, 436 F. 2d 1363 (C.A. 2), and *General Services Administration* v. *Benson*, 415 F. 2d 878 (C.A. 9), relied on by petitioners (Pet. 8), are also inapposite since neither involved an attempt to obtain disclosure of investigatory files.

under the Act was subject to discovery under the rules and practices of the Tax Court. We are aware of no decision in conflict with this holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1973.

DOJ-1973-10